carefully considered all of them before coming to any final conclusion in this matter, but I do not think that the principles therein laid down, so far as they might be applicable to the present case, can be held to prevail against what I apprehend to be the manifest intention of the testator as indicated in Clause 18 of the Will.

The next point for consideration is the position of the pecuniary legatees under Clause 20 of the Will. The question is whether these legacies rank with the legacies given by Clause 10 and are charged on the general estate to the same extent as those earlier legacies or whether they are payable out of the residuary estate. Here again we have to try to ascertain the intention of the testator. I agree with the proposition that the fact that these legacies are given *after* the residuary devise and bequest does not necessarily preclude them from being charged on the general estate, but when one reads Clauses 19, 20 and 21 together, and particularly when one reads Clauses 20 and 21 together (the latter of which refers to "the balance of my residuary estate"), one is, I think, inevitably driven to the conclusion that the testator, in inserting Clause 20 where he did, intended that these legacies should be paid from the residuary estate as defined by Clause 19 and should not rank with the legacies given by Clause 10.

The only remaining point to consider is the position of the annuitants under Clause 19 of the Will, and the question here is whether these annuities are charged on the corpus of the residuary estate or only on the income thereof. In Clause 19 of the Will the testator directed the payment of these annuities out of the income of his residuary estate, but the Will contains no direction as to any surplus income, and when we come to Clause 21 we find that the testator proceeds to deal with the *balance* of his residuary estate after payment of all specific and pecuniary legacies *and after due provision is made for the payment and continuance of all annuities* bequeathed by the Will. In my view it is clear that these annuities are charged on the corpus of the residuary estate. This view has the support of ample authority and it is only necessary to mention a few of the cases, for example:—

Birch v. *Sherratt*, 2 Ch. App. 644.
Wormald v. *Muzeen*,17 Ch. D. 107.
Re Mason, 8 Ch. D. 411.
In re Howarth, 1909, 2 Ch. D. 19.
In re Young, 1912, 2 Ch. D. 479.

In *Stelfox* v. *Sugden* (70 English Reports, 410) it was held that the annuity was payable out of rents and income, and not out of corpus, but that case seems to me to be clearly distinguishable from the present one and from those cited above, because there the Will expressly provided for the destination of the surplus income during the life of the annuitant and it was on that point that the decision was based. In other respects it supports the view I have taken in the present case (*vide* Judgment of Page Wood, V.C., at pages 412 and 413).

The Answer to Question 6 is therefore that the devises and bequests in the Will and Codicil are liable to abate in the following order:—

(*a*) the gift of the balance of the residuary estate contained in Clauses 21 and 22 of the Will;
(*b*) the legacies given by Clause 20 and the annuities given by Clause 19 of the Will;
(*c*) the gift of $50,000 to charity contained in Clause 18 of the Will;
(*d*) the pecuniary legacies contained in that part of the Will anterior to Clause 18, including the additional pecuniary legacies given by Clauses 3 and 4 of the Codicil;
(*e*) the specific devises and bequests given by Clauses 8, 9, 13 and 21 of the Will and Clauses 1 and 2 of the Codicil.

Order accordingly.

Solicitors for the Plaintiff—*Messrs. Chan & Eber.*

Solicitors for the 1st Defendant—*Messrs. John G. Campbell & Co.*

Solicitors for the 2nd & 4th Defendants—*Messrs. Donaldson & Burkinshaw.*

Solicitors for the 3rd Defendant—*Messrs. Johannes and Sammy.*

Solicitors for representative of pecuniary legatees —*Messrs. Drew & Napier.*

Solicitors for annuitants, other than daughters— *Messrs. Allen & Gledhill.*

Solicitors for infant representing remaining legatees other than 1st Defendant—*Messrs. Zehnder Brothers.*

Solicitor for the 5th Defendant—*S. C. Goho, Esq.*

[APPELLATE CIVIL JURISDICTION]

WHITLEY, J.
October 21, 1932.

TERRELL, J., MILLS and COBBETT, JJ.
June 23, 1933.

RE: YAP E. BOON.

[SINGAPORE BANKRUPTCY No. 253 of 1931]
[CIVIL APPEAL No. 4 of 1933]

Ordinance No. 44 (Bankruptcy)—Receiving and Adjudication Orders—Petitioning Creditors' debt not in existence at date of act of Bankruptcy —Annulment of Orders.

When Receiving and Adjudication Orders have been made against a debtor at the instance of a creditor whose debt was not in existence at the date of the act of bankruptcy relied on, no receiving or adjudication orders will be made; and if such orders have been made they will be annulled; as the Court has no discretion to refuse to set aside such orders if wrongly made.

Motion.

On 17th November 1930 one Yap E. Boon committed an available act of bankruptcy. Subsequently on the 10th January, 1931 he

incurred a debt to the Petitioning Creditors. On the 10th April, 1931 the Petitioning Creditors filed a bankruptcy petition against him, relying on the act of bankruptcy committed on the 17th November, 1930, on which date their debt had not yet been incurred. Receiving and Adjudication Orders were made against the debtor on 19th June, 1931. The Official Assignee on the 16th September, 1932 obtained an order against other creditors (United Engineers Ltd.) that they do repay to him the sum of $2,400 received by them since the commencement of the bankruptcy, whereupon such creditors moved to annul the order of adjudication.

Rhodes for United Engineers Ltd.

Haydon for Petitioning Creditors.

Assistant Official Assignee for Official Assignee.

The facts and arguments appear from the Judgment.

WHITLEY, J.—The facts leading up to this motion under section 103 of Ordinance 44 (Bankruptcy) to annul an adjudication order are shortly as follows:—

On 17th November, 1930 The United Engineers Limited levied execution against Yap E. Boon by seizure of his property under a Writ of Seizure and Sale.

Between November, 1930 and 2nd January, 1931 Yap E. Boon paid to the United Engineers sums amounting $2,400.

On 1st April, 1931 the Petitioning Creditors Messrs. Adamson Gilfillan filed a bankruptcy petition against Yap E. Boon.

Their claim against him was for $400-70 due on a promissory note dated 10th January, 1931.

The act of bankruptcy relied on was the execution on 17th November, 1930 referred to above.

A Receiving Order and an Adjudication Order were made on 19th June, 1931 following upon an order for substituted service.

On 16th September 1932 an order was made that the United Engineers do pay the said sum of $2,400 to the Official Assignee.

The United Engineers thereupon moved the Court under Section 103 to annul the Adjudication Order on the grounds that the debt to the Petitioning Creditors was not in existence on the 17th November 1930 when the act of bankruptcy relied upon was committed.

Section 103 (1) reads:—

> Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt..... the Court may annul the adjudication.

It is clear that the petitioning creditors' debt had not accrued due before the act of bankruptcy on which the petition was founded. In such a case in England the rule has always been that no adjudication order will be made. *Moss* v. *Smith*, 1 Camp. 489 and *Exparte Hayward*, L.R. (1870) 6 Ch. App. 546. Although the Bankruptcy law in this Colony differs in material particulars from the English law, the principles upon which it is founded and administered are essentially the same and this rule which is not the creature of statute is I think one which appears to be based upon common sense and expediency and should be followed here.

That being so it would follow that the debtor ought not to have been adjudged bankrupt on the Petition as it stood and the Court accordingly has power to annul the adjudication.

The jurisdiction conferred by section 103 is however discretionary and it would not, in the absence of special circumstances, be a good exercise of discretion to make an order of annulment where, if the bankrupt were applying for his order of discharge, an order of discharge would not be granted [*per* Stirling, L.J. in *Re Keet*, (1905) 2 K.B. 666.]

That was a case under section 35 of the Bankruptcy Act 1883 the wording of which is similar to our section 103 and although the facts in that case were entirely different from those in the present case the principle there laid down would seem to be applicable.

In his affidavit dated 7th October, 1932 Soh Beng Hong the assistant cashier of the Petitioning Creditors states that on several days between 10th and 24th March, 1931 he found the debtor's house empty and shut up; that he was informed that the debtor had gone away without telling anybody; that he could not find him at his place of business which he had left without informing anybody and leaving no address; and that he has not been heard of since either at his house or place of business.

That statement which is not challenged or contradicted is sufficient to establish that the debtor absconded on or about the 10th of March, 1931. Such absconding if with intent to defeat or delay his creditors constitutes an act of bankruptcy under section 3(4) of the Bankruptcy Ordinance. "Intent to defeat or delay" is in respect of the acts of bankruptcy in that subsection a matter of fact and must be proved as such. It seems to me that the facts deposed to in this affidavit are sufficient to prove and indeed are only consistent with such an intent.

That being so it would follow that no order of discharge would be granted if application for the same were now made and furthermore that although the act of bankruptcy relied upon was anterior in date to the petitioning creditors' debt yet a further act of bankruptcy had been committed subsequent to the debt accruing due. The petitioning creditors would have been entitled to an adjudication order based upon this later act of bankruptcy.

By section 46 of the Bankruptcy Ordinance the Bankruptcy is deemed to have relation to and to commence at the time of the first act of bankruptcy proved to have been committed within twelve months preceding the date of adjudication which would be the execution on the 17th November, 1930. Consequently the rights of the

Official Assignee as against the United Engineers would be precisely the same if the petition had been founded upon the act of bankruptcy in March, 1931 as on the act of bankruptcy in November, 1930.

In effect then, as matters stand at present, substantial justice has been done and all creditors can prove alike. If the adjudication order were annulled one creditor would obtain a preference over others.

I was asked to amend the petition by substituting the later act of bankruptcy for the earlier one but I do not think this is desirable or necessary as I am given a discretion and I am satisfied that this is not a case in which I ought to annul the adjudication order.

From this decision the United Engineers Ltd., appealed. The Appeal was heard on the 13th June, 1933. Terrell, Mills and Cobbett, JJ.

Storr for United Engineers Ltd.

Haydon for Petitioning Creditors.

Assistant Official Assignee for Official Assignee.

Cur. Ad. Vult.

TERRELL, J.—The short facts of this case are as follows:

On the 17th November, 1930, the United Engineers Limited having recovered judgment against the bankrupt levied execution by seizure of his property under a writ of seizure and sale. Between November, 1930, and 2nd January, 1931, the bankrupt paid the United Engineers $2,400.

The Petitioning Creditors' debt was not incurred until the 10th January, 1931, and accordingly was not in existence on the 17th November, 1930, the date of the execution. The Petitioning Creditors nevertheless relied on the execution of the 17th November, 1930, as the ground of their petition which was filed on the 1st April, 1931.

In England according to a well established rule the petitioning creditor's debt must have been in existence at the time of the act of bankruptcy relied on; otherwise no adjudication order will be made (*Moss* v. *Smith*, 1 Camp. page 489, and *ex parte Hayward*, 6 Ch. App. page 546), and the learned judge below held that a similar rule should be applied in the administration of bankruptcy in the Colony. This proposition was not disputed by the Official Assignee, respondent in the appeal.

The learned judge, however, held that under Section 103 (1) of the Ordinance he had a discretion, and in the circumstances of the case exercised such discretion in refusing to make an order to annul the bankruptcy. Against this judgment the United Engineers have appealed.

Section 103 (1) of the Ordinance reads as follows:—

> "103—(1) Where in the opinion of the Court a debtor ought not to have been adjudged bankrupt or where it is proved to the satisfaction of the Court that the debts of the bankrupt are paid in full or where it appears to the Court that proceedings are pending in some other part of Her Majesty's dominions or in any British protected State of the Malay Peninsula for the distribution of the bankrupt's estate and effects among his creditors under the Bankruptcy or Insolvency laws of that part of Her Majesty's dominions or of that British Protected State and that the distribution ought to take place in that part of Her Majesty's dominions or of that British Protected State the Court may annul the adjudication."

It will be seen that the section is divided into two parts. The Court may annul the adjudication either

(a) when the debtor ought not to have been adjudged bankrupt. This clearly refers to circumstances in existence at the date of the bankruptcy petition, as for instance, that the debtor was not carrying on business in the jurisdiction, or that he had never been served, or that the petitioning creditor had no provable debt, etc.,—or

(b) that the debts have been paid in full. This equally clearly refers to something that has happened after the date of the adjudication order. In the latter case there is no dispute that the adjudication order was properly made in the first case but owing to subsequent payment in full of his debts the bankrupt is entitled to apply for annulment in lieu of discharge, and be put in the same position as if he had never been adjudged.

This is in fact an indulgence to the bankrupt and I see no reason to doubt the authority of the case of *In re Keet*, 1905, 2 K.B. page 666, which decides that in such a case the Court will exercise its discretion and may refuse to make an order of annulment in a case where it would not have made an order of discharge. For, even if the debts are subsequently paid in full the adjudication order was properly made in the first instance and as Vaughan Williams, L.J. says at page 674, the bankrupt can only obtain the order of annulment if the Court thinks fit and not *ex debito justitiae*.

In cases, however, falling under the first part of the section it is to be assumed that the order of adjudication was not properly made. There must have been some defect and the debtor "ought not to have been adjudged bankrupt." Accordingly quite different considerations apply and I cannot agree with the learned trial judge that the Court has any discretion to refuse to set aside an order which was in effect wrongly made.

It is urged that the word "may" gives the Court a discretion even in this case; but it is a well known rule of construction that "when a statute confers an authority to do a judicial act in a certain case, it is imperative on those so authorised, to exercise the authority when the case arises and its exercise is duly applied for by a party interested and having the right to make the application," *McDougal* v. *Paterson*, 1851, 6 Ex. 337 (note).

It is common ground that the order ought never to have been made and I think it follows logically that the present appellants are entitled as a matter of right to have it set aside.

The learned Assistant Official Assignee argued that the matter should be considered in the light of what the Court would have done if the objection had been raised when the petition was first heard. It is said that leave would have been given to amend the petition and found it upon another act of bankruptcy—namely that the bankrupt has absconded with a view to defeat and delay his creditors. I think this argument is misconceived for several reasons; first it is quite impossible to speculate now what the Court might or might not have done; secondly the suggested second act of bankruptcy was never proved, as the affidavit of Soh Beng Hong of the 7th October, 1932, did not allege that the debtor's absenting himself was " with the intent to defeat and delay his creditors " and the omission of this allegation is fatal (*In re Skelton*, 37 L.T.R. page 43). Again it would be quite irrelevant if on the trial of an action the pleadings were found to be deficient, to argue that if a proper application to amend had been made at the proper time the application might have been granted and that accordingly the case should proceed as if the application had in fact been made and granted.

The Official Assignee did indeed apply to amend and, if he had done so, the application would have had to be refused as there is no authority for the proposition that a petition can be amended after the adjudication order has been made, or in the absence of the bankrupt, who certainly would be affected by any such order, and would have had to be served under the provisions of Rule 18.

It might indeed have been argued as a preliminary objection in the Court below that in view of the provisions of rules 15 and 18 no order could in any case be made in the absence of service on the bankrupt. This point was not, however, raised in the Court below, and I think it would have been too late to raise it in the Court of Appeal. In any case, it was not raised and I do not propose to deal with it.

I would accordingly allow the appeal and set aside the receiving and adjudication orders. By consent between the parties there will be no order as to costs.

MILLS, J.—The facts in this case have been stated in the judgment of the learned President, and I need not re-state them.

I agree that the learned trial Judge was correct in applying the English rule that an adjudication order ought not to be made unless the Petitioning creditor's debt was in existence at the date of the act of bankruptcy set out in the petition. It follows that in the present case the adjudication order ought not to have been made.

During the course of the hearing, however, it was alleged that the affidavit of one Soh Beng Hong disclosed certain facts on which the trial Judge was asked to hold that a different act of bankruptcy had been committed; the trial Judge did so hold, and on the strength of that decision, he declined to annul the adjudication order.

Whatever may have been the mode in which this new allegation was made, it involved an application to the Court to decide that Yap E. Boon had committed an available act of bankruptcy; indeed, the advocate and solicitor of the petitioning creditor actually applied to the Court to amend the bankruptcy petition by substituting this new act of bankruptcy.

In my opinion, an application of this nature is of fundamental importance, since an act of bankruptcy is the *fons et origo* of bankruptcy proceedings.

I am of opinion that, in the absence of exceptional circumstances, the debtor ought to be given an opportunity to be heard before he is held to have committed an act of bankruptcy; and that in the present instance notice of the application should have been served on Yap E. Boon..

It is now out of the question to adjourn the hearing, and the only alternative given by Rule 18 of the Bankruptcy Rules is to dismiss the application.

But I think the matter may be put higher than that: when an application is made to the Court to hold that a debtor has committed an act of bankruptcy, the position of the debtor *vis-a-vis* the application is that of a party, and there can be no doubt that the debtor is affected by the application: in that case Rule 15 of the Bankruptcy Rules applies, and this Rule lays down that, except in certain circumstances which do not exist in the present instance, where any party is affected by the application, no order shall be made unless upon the consent of such party duly shown to the Court or upon proof that notice of the intended application has been duly served upon such party.

Whichever view is taken, the failure to serve notice of the application on Yap E. Boon constitutes, in my opinion, a fatal defect which precludes the Court from holding that Yap E. Boon committed the alleged act of bankruptcy.

I hold therefore that the learned trial Judge was wrong in deciding that Yap E. Boon committed the alleged act of bankruptcy.

It follows that he ought to have annulled the adjudication order.

In my opinion this Court ought to annul the adjudication order and rescind the receiving order and set aside the order whereby the United Engineers Limited were ordered to pay the sum of $2,400 to the Official Assignee.

COBBETT, J.—In my opinion this appeal must be allowed. The facts are simple and not in dispute. The debtor Yap E. Boon owed the United Engineers $2,400/-. On 17/11/30 the United Engineers levied execution by seizure of

Yap E. Boon's property under a Writ of Seizure and Sale in D.C.Suit No. 1449 of 1929 for an amount exceeding $100. Under the provisions of Ordinance 44 (Bankruptcy) the debtor thereby committed an act of Bankruptcy of which the United Engineers had notice. The debtor paid this sum by instalments in 1930 and 1931.

In January 1931 the debtor guaranteed a composition of the debts of Chop Sin Hock Seng a Johore firm by signing a number of promissory-notes in favour of this firm's creditors. Amongst these promissory-notes was one for $400/70 in favour of Messrs. Adamson Gilfillan & Co., Ltd., payable by instalments. In default of payment of any instalment the whole of the balance unpaid was to become due immediately. The first instalment was not paid and on March 27th, 1931, Messrs. Adamson Gilfillan & Co., Ltd. issued a Bankruptcy Petition against the debtor. Between March 10th and 24th repeated efforts to find the debtor were made but he had disappeared.

The petition alleged as the act of bankruptcy the seizure of the 17/11/30 by the United Engineers. Substituted service of the petition was resorted to and on the 19/6/1931 a receiving order was made and the debtor was adjudicated bankrupt.

On the 16th April the Official Assignee moved in the Bankruptcy for an order that the United Engineers should pay to him the $2,400/- which they had received from Yap E. Boon and an order was made in terms of the motion.

On the 21st October 1932 the United Engineers moved that the order of adjudication be annulled. The motion was opposed by the Official Assignee and Messrs. Adamson Gilfillan the petitioning creditors and Mr. Justice Whitley refused the motion and it is this order dismissing the motion that is appealed from.

It is to be noted that if the Petition had been in order there could be no objection to the order against the United Engineers to pay to $2,400/- as the Official Assignee's title related back to the act of Bankruptcy of the 17 11/30 and the United Engineers received payment with notice of this Act of Bankruptcy, but it is objected that the petition is not in order because the Act of Bankruptcy alleged occurred before the debt of the Petitioning Creditors was in existence. It was admitted that the rule of law that a Bankruptcy Petition cannot be founded on an act of bankruptcy which occurred before the Petitioner's debt existed applies in this Colony. Therefore it is clear that the petition was not in order. The position is as though the petition had not alleged any Act of Bankruptcy at all. The appellants therefore argue that the order of adjudication should not have been made and having been wrongly made should be annulled.

The Official Assignee argues that the real test is whether if all the facts had been known when the adjudication order was made the result would have been different, he says that another valid Act of Bankruptcy i.e. that the debtor had left the Colony with intent to defeat or delay his creditors could have been substituted by amendment. Certainly the affidavit of Soh Beng Hong goes a long way to shew that this was in fact what the debtor did but to my mind it does not go far enough and I think that the allegation of the intention to defeat or delay creditors is essential and in *re Skelton*, 37 L.T. N.S. 43 is sufficient authority for this.

The learned Judge in the Court below founded his judgment on the case of *In re Keet*, (1905) 2 K.B. 666 but with all due respect to him I think that case is not an authority for it proceeds on that part of the section which relates to annulment on payment in full. That is a case where the Receiving Order and Adjudication order were properly made on proper grounds.

The dicta of Lord Justice Stirling in that case that it would not be a good exercise of a discretion to make an order of annulment where if the bankrupt were applying for his discharge an order of discharge would not be granted, is incontestable but to say that an order of discharge would not be granted in this case is merely begging the question. The order of adjudication ought never to have been made and there would never have been any necessity to consider the question of discharge.

The material part of section 103 of Ordinance 44 is " where in the opinion of the Court a debtor ought not to have been adjudicated bankrupt .....the Court may annul the adjudication." This does not appear to me to give the Judge any discretion if in his opinion the debtor ought not to have been adjudicated. It merely enables him to annul the Bankruptcy and if that is his opinion he has really no option. It is not therefore the exercise of a discretion that we are called upon to consider but whether his opinion is right. I think it is wrong and that the debtor ought never to have been adjudicated and therefore I would allow the appeal.

By consent no order as to costs. Usual order for refund of deposit for security to appellant or his solicitors.

Appeal allowed.

Solicitors for United Engineers Ltd:
Drew & Napier.

Solicitors for Petitioning Creditors:
Donaldson & Burkinshaw.

Assistant Official Assignee for Official Assignee.